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Robert G. Byrd

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MALICIOUS PROSECUTION IN NORTH CAROLINA†

ROBERT G. BYRD*

In this survey of the North Carolina law of malicious prosecution, the author examines the elements of the tort, including want of probable cause, malice, and termination of the previous prosecution in the plaintiff's favor. Although there exists a large body of case law dealing with malicious prosecution, the article suggests that confusion remains in several areas. The courts have not always clearly distinguished malicious prosecution from the kindred tort of abuse of process and have developed conflicting precedent on the question whether the judge or the jury is to determine the existence of probable cause for the prior prosecution. Finally, the author discusses a recent decision of the supreme court that has apparently expanded the right to maintain a suit for malicious prosecution of a civil action.

INTRODUCTION

The tort of malicious prosecution recognizes the individual's interest in not being subjected to unjustified litigation. As the prosecution of a legal action may result in harassment, annoyance, inconvenience, loss of time, legal expenses, confinement, injury to reputation, interference with property, and, perhaps, the invasion of other interests, the interest protected by a malicious prosecution action may not be regarded as trivial. Substantial losses may result from the institution of any action, but a recovery cannot be had merely because a proceeding is begun or because it is prosecuted unsuccessfully. To permit recovery the prosecution must be unjustified.¹

Courts exist to resolve conflicts and litigation is the process through which they do so. For this purpose, a substantially unfettered access to the courts is in the public interest. Public policy favors the enforcement of the criminal law and encourages, or at least should not discourage, the initiation of a prosecution when reasonable grounds exist to believe that a crime has been committed. Even when reasonable grounds are absent, a prosecution to enforce the criminal law, rather than to accomplish the prosecutor's own purposes, may be justified. In recognition of this public interest the cause of action for malicious prosecution has been narrowly

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* Professor of Law, University of North Carolina at Chapel Hill.

¹ Beal v. Robeson, 29 N.C. 280 (1847).

confined so that recovery is permitted only when litigation has been instituted maliciously and unreasonably and has terminated unsuccessfully.²

Because malice must be present, the tort has been described as one that requires extreme fault.³ However, since the malice required is not personal ill will, spite, or grudge and may be shown by proof of a wrongful act that is intentionally and knowingly done without just cause,⁴ or by inferences or presumptions based upon a variety of circumstances,⁵ the extreme fault characterization can be misleading. The *Restatement of Torts* avoids use of the term "malice" altogether and substitutes for it the requirement that the prior prosecution be initiated "primarily because of a purpose other than that of bringing an offender to justice."⁶

To recover for malicious prosecution the plaintiff must establish that the defendant (1) initiated the earlier proceeding (2) maliciously and (3) without probable cause, and that (4) it terminated in the plaintiff's favor.⁷ Malice and the absence of probable cause must concur before liability attaches.⁸ Proof of the malicious institution of the prior action does not establish a right to recover if probable cause for its prosecution existed.⁹ Although an inference of malice may be drawn from the institution of a groundless action,¹⁰ malice is a separate and essential element of the tort,¹¹ and mere proof that the action was instituted unreasonably does not necessarily entitle the plaintiff to recover.

MALICIOUS PROSECUTION DISTINGUISHED FROM ABUSE OF PROCESS

The tort of abuse of process also provides protection against wrongful litigation and confusion of it with malicious prosecution is not uncommon.¹² Both provide a remedy for misuse of process and sometimes they completely overlap so that the same facts are sufficient to establish both torts.¹³ More often, evidence that aids to establish the elements of one

² *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966).

³ W. SEAVEY, P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* 912 (2d ed. 1964).

⁴ *Gaither v. Carpenter*, 143 N.C. 240, 55 S.E. 625 (1906); *Railroad Co. v. Hardware Co.*, 138 N.C. 174, 50 S.E. 571 (1905).

⁵ See pp. 302-03 *infra*.

⁶ *RESTATEMENT OF TORTS* § 653(1)(a)(ii) (1938).

⁷ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966); *Mooney v. Mull*, 216 N.C. 410, 5 S.E.2d 122 (1939).

⁸ *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

⁹ *Ely v. Davis*, 111 N.C. 24, 15 S.E. 878 (1892).

¹⁰ *Brown v. Martin*, 176 N.C. 31, 96 S.E. 642 (1918).

¹¹ *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E.2d 751 (1960); *Turnage v. Austin*, 186 N.C. 266, 119 S.E. 359 (1923).

¹² See, e.g., *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

¹³ *Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938) (*semble*); *Railroad Co. v. Hardware Co.*, 138 N.C. 174, 50 S.E. 571 (1905).

tort may be relevant to prove the other. For example, proof of an ulterior motive, which is essential in an action for abuse of process, is important evidence of malice and absence of probable cause in a malicious prosecution action.¹⁴

The North Carolina Supreme Court has recognized this confusion and has frequently attempted to distinguish the torts.¹⁵ The court's attempts are usually limited to repetition of strung-together quotations from earlier cases and seem to have become a routine part of opinions involving either tort rather than a genuine effort to deal with basic problems. Distinctions made by the court are consistent with the usual broad statement of the scope of the two torts: malicious prosecution consists of the malicious institution of a groundless action while abuse of process entails the use of legal process, which has been validly issued, to accomplish objectives for which it was not intended.¹⁶

Attorneys have experienced considerable difficulty in prosecuting claims based on these torts. They have identified their client's cause of action as one for malicious prosecution—or for abuse of process—when the facts permitted recovery, if at all, for the other tort only.¹⁷ Although the label attached to a cause of action, standing alone, may be of no importance,¹⁸ a not uncommon result is the omission of factual allegations necessary to establish a right of recovery.¹⁹ Sometimes the plaintiff's attorney has generously conceded that his client's action was not for the tort the facts were found to establish²⁰ or the defendant's attorney has vigorously asserted a defect or defense appropriate in an action for malicious prosecution but inapplicable to plaintiff's action for abuse of process.²¹ Some attorneys have avoided the choice by alleging two causes

¹⁴ *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944).

¹⁵ *Fowle v. Fowle*, 263 N.C. 724, 140 S.E.2d 398 (1965); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955); *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942); *Wright v. Harris*, 160 N.C. 542, 76 S.E. 489 (1912).

¹⁶ Cases cited note 15 *supra*.

¹⁷ *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945); *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942); *Carpenter, Baggett & Co. v. Hanes*, 167 N.C. 551, 83 S.E. 577 (1914); *Wright v. Harris*, 160 N.C. 542, 76 S.E. 489 (1912).

¹⁸ *Benbow v. Caudle*, 250 N.C. 371, 108 S.E.2d 663 (1959); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

¹⁹ *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942).

²⁰ *Benbow v. Caudle*, 250 N.C. 371, 108 S.E.2d 663 (1959); *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957); *Hewitt v. Wooten*, 52 N.C. 182 (1859).

²¹ *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Lockhart v. Bear*, 117 N.C. 298, 23 S.E. 484 (1895); *Sneedon v. Harris*, 109 N.C. 349, 13 S.E. 920 (1891).

of action based on the same facts²² or by the omission of any descriptive label.²³

Abuse of process requires both an ulterior motive and an act in the use of legal process not proper in the regular prosecution of the proceeding.²⁴ Both requirements relate to the defendant's purpose to achieve through use of the process some end foreign to those it was designed to effect. The ulterior purpose may be to extort money,²⁵ to collect a debt,²⁶ to gain possession of property,²⁷ to injure plaintiff's person,²⁸ business²⁹ or reputation,³⁰ or to gain some other advantage not within the scope of the process.³¹ Institution of legal process with bad intentions or improper motives, without more, does not constitute an abuse of process.³² Some act by which the defendant uses the process in an effort to achieve his improper purpose must be present.³³

The supreme court's decisions state—and usually require—that the act of misuse must occur *after the process has been issued*³⁴ and, on this basis, hold that a threat to initiate process—which is in fact later procured—is insufficient.³⁵ If the process has issued, the act required may be nothing more than an offer by defendant to discontinue the process if

²² *Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938); *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936).

²³ *Fowle v. Fowle*, 263 N.C. 724, 140 S.E.2d 398 (1965); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

²⁴ *Benbow v. Caudle*, 250 N.C. 371, 108 S.E.2d 663 (1959); *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E.2d 410 (1958); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

²⁵ *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1946); *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937); *Wright v. Harris*, 160 N.C. 542, 76 S.E. 489 (1912).

²⁶ *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938).

²⁷ *Jackson v. Telegraph Co.*, 139 N.C. 347, 51 S.E. 1015 (1905); *Sneeden v. Harris*, 109 N.C. 349, 13 S.E. 920 (1891).

²⁸ *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936).

²⁹ *Ludwick v. Penny*, 158 N.C. 104, 73 S.E. 288 (1911).

³⁰ *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937).

³¹ *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957) (doctor commits plaintiff to mental hospital to rid himself of an incurable patient); *Lockhart v. Bear*, 117 N.C. 298, 23 S.E. 484 (1895) (creditor's attempt to reach property exempt from execution).

³² *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E.2d 410 (1958); *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1946); *Martin v. Reidsville Motor Co.*, 201 N.C. 641, 161 S.E. 77 (1931).

³³ *Benbow v. Caudle*, 250 N.C. 371, 108 S.E.2d 663 (1959); *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942); *Stanford v. Grocery Co.*, 143 N.C. 419, 55 S.E. 815 (1906).

³⁴ *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955); *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1946); *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Carpenter, Baggott & Co. v. Hanes*, 167 N.C. 551, 83 S.E. 577 (1914).

³⁵ *Benbow v. Caudle*, 250 N.C. 371, 108 S.E.2d 663 (1959).

plaintiff pays him money³⁶ or a threat to continue it unless plaintiff pays him.³⁷ The misuse may be defendant's mistreatment of plaintiff while he is in custody under an arrest procured by defendant³⁸ or defendant's levy on plaintiff's property of a value ten times the amount of the debt he is attempting to collect.³⁹

To identify a specific act after issuance of the process through which defendant attempts to use it as leverage to accomplish a collateral purpose is not always as easy as in the examples above. Suppose defendant causes plaintiff's arrest so that he can take possession of land from plaintiff and, while plaintiff is in custody, defendant goes into possession.⁴⁰ Or suppose a creditor successfully extorts money from his debtor⁴¹ or a doctor commits a patient with an incurable disease to a mental institution to rid himself of the patient.⁴² If in each situation all proceedings on the process involved were completely regular, has the process been abused? Can a distinct act of abuse be found in taking possession of land, in accepting payment of the extorted money, or in permitting plaintiff's confinement in the mental institution to continue? In each of these situations the court found an action for abuse of process to exist. Yet, perhaps in the order in which they are set out, each requires greater rationalization to find any act after issuance of the process that is irregular to normal proceedings on it.

One might reasonably suggest that these cases run against the current of North Carolina cases in this area. To dismiss the cases on this basis, however, may be to ignore a problem that seems to present recurring difficulty for the supreme court. In addition to these, there are three other key cases⁴³ in the area which have been decided by a bare majority of the court. Two points of conflict can be identified. One is whether some improper act in the use of the process after its issuance is necessary;⁴⁴ the other is whether the evidence in a particular case is suf-

³⁶ *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Lockhart v. Bear*, 117 N.C. 298, 23 S.E. 484 (1895).

³⁷ *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937).

³⁸ *Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938); *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936).

³⁹ *Railroad Co. v. Hardware Co.*, 138 N.C. 174, 50 S.E. 571 (1905).

⁴⁰ *Sneed v. Harris*, 109 N.C. 349, 13 S.E. 920 (1891).

⁴¹ *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937); *Wright v. Harris*, 160 N.C. 542, 76 S.E. 489 (1912).

⁴² *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957).

⁴³ *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945); *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944); *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937).

⁴⁴ See *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1945) (majority and dissenting opinions).

ficient to show such an act.⁴⁵ To the extent that the second point represents nothing more than a difference of opinion on what facts may be found from the evidence, the cases in which it arises assume no particular importance since this type of divergence occurs in all areas of the law. In some cases, however, the dispute, although stated in these terms, seems to go to the more basic question whether the regular use of process to accomplish some collateral objective is enough to constitute its abuse. A proper context in which to examine this question is to show how the action for abuse of process complements that for malicious prosecution.

Perhaps the greatest practical significance of the abuse of process action is that it provides a remedy for losses caused by improper use of legal process in situations in which a malicious prosecution action is unavailable. When legal process against the plaintiff is justifiably initiated by the defendant, no action for malicious prosecution can be maintained;⁴⁶ yet defendant may use the process to gain advantages beyond those it was designed to give. For example, defendant may cause plaintiff's arrest for a crime plaintiff has committed and subsequently offer to discontinue the prosecution if plaintiff pays a debt claimed to be owed. Since under these circumstances reasonable grounds for the prosecution exists, an action for malicious prosecution would fail and abuse of process is the only basis for recovery. Here, an irregular use has been made of the process after its issuance.

A malicious prosecution action is also unavailable when regular use is made of process to accomplish some collateral purpose, if reasonable grounds for prosecution exist. Whether this gap left by the malicious prosecution action is filled by the action for abuse of process is the question on which conflicting views seem to appear in the North Carolina cases. Involved in its determination is the basic policy decision whether the individual's interest should be subordinated to the public interest in unfettered access to the courts. Reasonable persons may disagree on what recognition they give to these competing interests. Despite inconsistent decisions and substantial dissents, the conclusion that North Carolina does not recognize an abuse of process action under these circumstances seems correct.⁴⁷ Yet two factors cause doubt to linger whether the court has ever explored the basic question involved in this determination. First, in the cases which establish the rule, the court does not state reasons for the

⁴⁵ See *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944) (majority and dissenting opinions).

⁴⁶ See pp. 291-92 *infra*.

⁴⁷ Cases cited notes 33 & 34 *supra*.

requirement that an act in the use of the process be present. Second, decisions that cannot be reconciled with any realistic application of the requirement continue to be handed down.

WANT OF PROBABLE CAUSE

In a malicious prosecution action the plaintiff must allege⁴⁸ and prove⁴⁹ that the prosecution was initiated without probable cause. If under the circumstances a reasonable belief in guilt exists, neither the innocence of the plaintiff,⁵⁰ nor the fact that the prosecution was with malice,⁵¹ nor even the two combined is sufficient to impose liability. Though an action is maliciously prosecuted, no liability exists unless it is instituted or continued without reasonable grounds. The enforcement of the criminal law is of such importance that it justifies the prosecution of persons apparently guilty although their prosecution is motivated by personal ill will or other ulterior reasons. For the same reason, the mere fact that an innocent person has been prosecuted does not establish a cause of action. If reasonable grounds for suspicion are present, the prosecution may be justified, and the innocence of the person prosecuted is largely immaterial.

Good faith alone is not sufficient to constitute probable cause. An honest belief in the plaintiff's guilt is not enough unless it is reasonable under the circumstances.⁵² Nevertheless, whether probable cause exists is not to be determined solely on the basis of external circumstances so that the belief held by the defendant is totally disregarded. When the defendant knows that the plaintiff is innocent, no probable cause can be found and the defendant is held liable despite the existence of circumstances that, except for this knowledge, create a reasonable suspicion of guilt.⁵³ Although defendant has no actual knowledge of the plaintiff's innocence, his belief that the charges against the plaintiff are false is a relevant factor on the issue of probable cause; but it should not, as does actual knowledge of the plaintiff's innocence, necessarily establish the absence of probable cause.⁵⁴

⁴⁸ Greer v. Skyway Broadcasting Co., 256 N.C. 382, 124 S.E.2d 98 (1962); Ely v. Davis, 111 N.C. 24, 15 S.E. 878 (1892).

⁴⁹ Newton v. McGowan, 256 N.C. 421, 124 S.E.2d 142 (1962); Miller v. Greenwood, 218 N.C. 146, 10 S.E.2d 708 (1940).

⁵⁰ Mooney v. Mull, 216 N.C. 410, 5 S.E.2d 122 (1939); Swain v. Stafford, 26 N.C. 392 (1844); McRae v. O'Neal, 13 N.C. 166 (1829).

⁵¹ Tucker v. Davis, 77 N.C. 330 (1877); Plummer v. Gheen, 10 N.C. 66 (1824).

⁵² Beal v. Robeson, 29 N.C. 280 (1847).

⁵³ Bradley v. Morris, 44 N.C. 395 (1853); Bell v. Percy, 27 N.C. 83 (1844).

⁵⁴ Bryant v. Murray, 239 N.C. 18, 79 S.E.2d 243 (1953); Taylor v. Hodge, 229 N.C. 558, 50 S.E.2d 307 (1948); Watt v. Greenlee, 9 N.C. 186 (1822).

Probable cause is the existence of facts and circumstances sufficient to excite in a reasonable mind a suspicion of guilt and to prompt a reasonable man, having a due regard for the rights of others, as well as his own, to commence the prosecution.⁵⁵ The existence of probable cause depends upon apparent guilt rather than actual guilt and involves the determination of what a reasonable person would have believed under the circumstances rather than what the defendant personally believed. Positive evidence of guilt need not be present, and the existence of facts and circumstances that raise a reasonable suspicion of guilt is sufficient to establish probable cause.

The question to be determined is the presence or absence of probable cause at the time the prior prosecution was begun, and it must be determined on the basis of facts and circumstances known to the defendant at that time.⁵⁶ Facts that establish the plaintiff's innocence or explain suspicious circumstances that existed earlier are inadmissible to show the absence of probable cause if they were unknown to the prosecutor when he initiated the original action.⁵⁷

Generally, courts also hold that the existence of probable cause cannot be established by later discovered evidence.⁵⁸ Circumstances that come to the defendant's knowledge after the prosecution is begun, whatever grounds for reasonable suspicion they create, are inadmissible except to establish the actual guilt of the accused.⁵⁹ A number of North Carolina cases indicate that facts unknown to the defendant when he began the prosecution may be considered to establish probable cause although they are insufficient to show actual guilt.⁶⁰ The apparent justification for the North Carolina view is the disfavor of an action for malicious prosecution, which has led courts generally to limit the action in a number of ways. This additional limitation goes far, however, since it permits the defendant to justify a malicious and unreasonable prosecution that has terminated in favor of the plaintiff by incriminating facts he later discovers. Whether the need for a relatively free access to the courts warrants the denial of liability under these circumstances is debatable.

⁵⁵ *Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962); *Swain v. Stafford*, 25 N.C. 289 (1843).

⁵⁶ *Motsinger v. Sink*, 168 N.C. 548, 84 S.E. 847 (1915); *Moore v. First Nat'l Bank*, 140 N.C. 293, 52 S.E. 944 (1905); *Swain v. Stafford*, 25 N.C. 289 (1843).

⁵⁷ *Rawls v. Bennett*, 221 N.C. 127, 19 S.E.2d 126 (1942); *Mooney v. Mull*, 216 N.C. 410, 5 S.E.2d 122 (1939); *Swain v. Stafford*, 26 N.C. 392 (1844).

⁵⁸ *W. PROSSER, LAW OF TORTS* § 113, at 860 (3d ed. 1964) [hereinafter cited as *PROSSER*].

⁵⁹ *Id.*

⁶⁰ *Mooney v. Mull*, 216 N.C. 410, 5 S.E.2d 122 (1939); *Johnson v. Chambers*, 32 N.C. 287 (1849); *Bell v. Percy*, 27 N.C. 83 (1844).

The reasonableness of defendant's action must be judged in the light of the total circumstances known to him at the time he initiated the proceeding. Actual knowledge of the plaintiff's innocence conclusively establishes the want of probable cause, and however grave other circumstances of suspicion may be, defendant cannot rely upon them to justify his action.⁶¹ Any reasonable suspicion that may exist when the defendant discovers plaintiff in possession of goods recently stolen from him disappears upon a satisfactory explanation by the plaintiff and others, of how he came into possession.⁶² A prosecution on the basis of information which unmistakably points to the plaintiff's guilt may be unreasonable when the source of information is no more than rumor.⁶³ The plaintiff's bad reputation is a relevant circumstance, since one may reasonably suspect a person with a bad reputation on less evidence than a person with a good reputation.⁶⁴

The diligence that the defendant must use in discovering what the facts are, or in ascertaining the accuracy of information in his possession, is that which a reasonable man would use under the circumstances.⁶⁵ To proceed on the basis of mere rumor without investigation is unreasonable.⁶⁶ When circumstances that otherwise seem incriminating are logically explained, the defendant can no longer reasonably rely upon them;⁶⁷ in some cases, a failure to afford the plaintiff an opportunity for explanation may preclude the existence of probable cause.⁶⁸ On the other hand, the reliability of plaintiff's own admissions made during the course of a civil suit cannot be questioned and they may be used to establish probable cause.⁶⁹ If the circumstances call for further inquiry, only a reasonable investigation is required, and when it has been made, probable cause may be found even though a more thorough investigation might have revealed that no crime had been committed.⁷⁰

Neither a mistake of fact⁷¹ nor an error of judgment⁷² on the de-

⁶¹ Bell v. Percy, 27 N.C. 83 (1844).

⁶² Gray v. Bennett, 250 N.C. 707, 110 S.E.2d 324 (1959); Bryant v. Murray, 239 N.C. 18, 79 S.E.2d 243 (1953); Rice v. Ponder, 29 N.C. 390 (1847).

⁶³ Tyler v. Mahoney, 166 N.C. 509, 82 S.E. 870 (1914); Tucker v. Wilkins, 105 N.C. 272, 11 S.E. 575 (1890).

⁶⁴ Bostick v. Rutherford, 11 N.C. 83 (1825).

⁶⁵ Swain v. Stafford, 26 N.C. 392 (1844).

⁶⁶ Cases cited note 63 *supra*.

⁶⁷ Cases cited note 62 *supra*.

⁶⁸ Swain v. Stafford, 26 N.C. 398 (1844).

⁶⁹ Rawls v. Bennett, 221 N.C. 127, 19 S.E.2d 126 (1942).

⁷⁰ Swain v. Stafford, 26 N.C. 392 (1844).

⁷¹ Turnage v. Austin, 186 N.C. 266, 119 S.E. 359 (1923).

⁷² Bell v. Percy, 27 N.C. 83 (1844).

fendant's part is inconsistent with a finding of probable cause. It may reasonably appear to the defendant that his property has been stolen when it has not been taken at all and that the plaintiff, who is innocent, stole it; under these circumstances his prosecution of the plaintiff is justified. In one case,⁷³ at least, the supreme court seems to have taken a harder view when the mistake involved is one of law rather than of fact, although mistake of law was not mentioned in the opinion. The court found that no probable cause existed for a perjury prosecution, even if it were proved that the plaintiff had testified falsely, because the false testimony was not pertinent to the inquiry before the court. For the defendant to prove that the plaintiff had lied under oath in a judicial proceeding was not enough to establish probable cause; he must have made appropriate inquiry about the law of perjury or proceed at his peril. Another type of case involving mistake of law is that in which the justification for an embezzlement prosecution depends in part upon whether defendant's or plaintiff's version of the legal effect of a transaction between them is accepted. The plaintiff contends that the effect of the transaction was to transfer the allegedly embezzled property to him while defendant claims its effect was to entrust the plaintiff with possession only under a consignment, employment, or similar relationship. In this situation the court seems to attach no particular significance to the fact that the mistake is one of law rather than of fact.⁷⁴ Also, in North Carolina a malicious prosecution action cannot be maintained when the prior prosecution was for conduct that did not constitute a criminal offense. This holding, however, is based on the view that the prior proceeding is a nullity.⁷⁵ Many jurisdictions hold that the defendant cannot escape liability because of a mistake of law but this view has been criticized.⁷⁶

Malice does not establish the want of probable cause or even create an inference that probable cause is lacking.⁷⁷ Proof that tends to show malice may be relevant, however, on the issue of probable cause. Evidence that the chief aim of the prosecution was to accomplish some collateral purpose is admissible to show the absence of probable cause, since "a person, bent on accomplishing some ulterior motive, will act upon much less convincing evidence than one whose only desire is to promote the public

⁷³ *Smith v. Deaver*, 49 N.C. 513 (1857).

⁷⁴ *Gray v. Bennett*, 250 N.C. 707, 110 S.E.2d 324 (1959); *Durham v. Jones & Powell*, 119 N.C. 262, 25 S.E. 873 (1896); *Marcus v. Bernstein, Cohen & Co.*, 117 N.C. 30, 23 S.E. 38 (1895).

⁷⁵ See p. 304 *infra*.

⁷⁶ PROSSER § 113, at 861.

⁷⁷ *Motsinger v. Sink*, 168 N.C. 548, 84 S.E. 847 (1915).

good.”⁷⁸ On this basis, want of probable cause may be shown by evidence that the defendant’s primary purpose in bringing the prosecution was to obtain the possession of personal property from the plaintiff⁷⁹ or to enforce the collection of a debt,⁸⁰ or by proof that a second prosecution was initiated upon the same evidence on which the plaintiff had already been acquitted.⁸¹

That the defendant, in bringing the prosecution, acted upon the advice of an attorney that the facts warranted it, is obviously significant to the determination of probable cause. An overwhelming majority of jurisdictions hold that reliance upon the advice of counsel in initiating the prosecution conclusively establishes probable cause.⁸² In North Carolina reliance upon the advice of counsel is only evidence, to be considered with other relevant evidence, that probable cause existed.⁸³ A full and fair disclosure of all facts must be made to the attorney and the advice must be sought in good faith.⁸⁴ If the defendant withholds information from the attorney or knows, despite the appearances of guilt that arise from the facts, that the plaintiff is innocent, he cannot hide behind his pretended reliance upon an attorney’s advice to avoid liability.⁸⁵

Presumptions and Inferences

A criminal proceeding, once begun, may be disposed of in a variety of ways and the nature of its disposition may have an important bearing on the issue of probable cause. The prosecution may be discontinued voluntarily or under an agreement between the parties; it may terminate in the plaintiff’s conviction or acquittal; or it may end at an earlier stage when a magistrate or grand jury finds no probable cause to exist. A particular disposition of the case at any stage of the proceeding, whether or not that disposition is final, may create a presumption or permit an inference concerning the existence or absence of probable cause for the prosecution.

⁷⁸ *Dickerson v. Atlantic Ref. Co.*, 201 N.C. 90, 159 S.E. 446 (1931).

⁷⁹ *Id.* (dictum).

⁸⁰ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966).

⁸¹ *Hinson v. Powell*, 109 N.C. 534, 14 S.E. 301 (1891). This may not be true when the two prosecutions are not identical or the second prosecution rests upon additional evidence. *Coble v. Huffines*, 133 N.C. 422, 45 S.E. 760 (1903).

⁸² *PROSSER* § 113, at 861-64.

⁸³ *Bassinov v. Finkle*, 261 N.C. 109, 134 S.E.2d 130 (1964); *Bryant v. Murray*, 239 N.C. 18, 79 S.E.2d 243 (1953); *Downing v. Stone*, 152 N.C. 525, 68 S.E. 9 (1910).

⁸⁴ *Id.*

⁸⁵ *Honeycut v. Freeman*, 35 N.C. 320 (1852). That the defendant acted upon the legal advice of a layman may be of no help to him. *Beal v. Robeson*, 30 N.C. 276 (1848); *cf. Morgan v. Stewart*, 144 N.C. 424, 57 S.E. 149 (1907).

The plaintiff's conviction of the charges against him creates a presumption that probable cause for the prosecution existed.⁸⁶ The presumption arises even though the conviction is reversed on appeal⁸⁷ or set aside by the trial court.⁸⁸ The conviction, whether by verdict of a jury, or by judgment of a court sitting without a jury, establishes probable cause. The presumption is conclusive and may not be rebutted by evidence which tends to show the absence of probable cause.⁸⁹ However, a conviction that was procured by perjury or other fraudulent means is not conclusive on the issue of probable cause and may be impeached.⁹⁰

An acquittal of the plaintiff does not create a presumption or permit an inference that probable cause was lacking.⁹¹ It is not evidence one way or the other as to whether there was probable cause for the prosecution.⁹² Grounds for reasonable suspicion of the plaintiff's guilt may exist when full proof of it cannot be established at the trial.⁹³ The verdict of acquittal indicates only that the evidence was not sufficient to overcome the presumption of innocence and to establish guilt beyond a reasonable doubt.⁹⁴ Beyond this, it does not disclose the relative strength of the evidence.

The discharge of the plaintiff after a preliminary examination before the magistrate or upon the failure of the grand jury to indict is *prima facie* evidence of the want of probable cause.⁹⁵ The absence of probable cause is not conclusively established by the discharge but in some cases⁹⁶ the court has held that the discharge operates to shift to the defendant the burden of showing that probable cause for the prosecution existed. Conversely, a finding of probable cause by the magistrate or grand jury is *prima facie* evidence that reasonable grounds for the prosecution existed.⁹⁷

⁸⁶ *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921); *Smith v. Thomas*, 149 N.C. 100, 62 S.E. 772 (1908).

⁸⁷ *Smith v. Thomas*, 149 N.C. 100, 62 S.E. 772 (1908); *Price v. Stanley*, 128 N.C. 38, 38 S.E. 33 (1901); *Griffis v. Sellars*, 19 N.C. 492 (1837).

⁸⁸ *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921).

⁸⁹ Cases cited note 86 *supra*.

⁹⁰ *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936); *Moore v. Winfield*, 207 N.C. 767, 178 S.E. 605 (1935).

⁹¹ *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E.2d 751 (1960); *Downing v. Stone*, 152 N.C. 40, 68 S.E. 9 (1910); *Morgan v. Stewart*, 144 N.C. 424, 57 S.E. 149 (1907).

⁹² *Id.*

⁹³ *Griffis v. Sellars*, 19 N.C. 492 (1837).

⁹⁴ *Bell v. Percy*, 33 N.C. 233 (1850).

⁹⁵ *Smith v. Eastern Bldg. & Loan Ass'n*, 116 N.C. 73, 20 S.E. 963 (1895); *Johnson v. Chambers*, 32 N.C. 287 (1849); *Bostic v. Rutherford*, 11 N.C. 83 (1825).

⁹⁶ *Smith v. Eastern Bldg. & Loan Ass'n*, 116 N.C. 73, 20 S.E. 963 (1895); *McRae v. O'Neal*, 13 N.C. 166 (1829); *Johnston v. Martin*, 7 N.C. 248 (1819).

⁹⁷ *Mitchem v. National Weaving Co.*, 210 N.C. 732, 188 S.E. 329 (1936).

Conflicting findings of the magistrate and the grand jury in the same case may neutralize the effect of each on the determination of probable cause in the malicious prosecution action.⁹⁸

The rule that the plaintiff's discharge *prima facie* establishes the absence of probable cause does not apply when the discharge is pursuant to an agreement between the parties.⁹⁹ A discharge under these circumstances is not based upon an inquiry into the reasonableness of the prosecution, and the reason for the inference no longer exists.¹⁰⁰ Some courts hold that a compromise entered into voluntarily by the plaintiff conclusively establishes probable cause.¹⁰¹ North Carolina has not given it this effect, but does deny recovery in this situation on grounds that, because of the compromise, the prosecution has not terminated in favor of the plaintiff.¹⁰²

Even though the plaintiff's actions may have induced the withdrawal of the charges against him, an inference of the want of probable cause may arise unless through his conduct he has participated in a termination of the prosecution that leaves open the question of its reasonableness. Thus, the mere fact that embezzlement charges against the plaintiff are withdrawn when he pays for goods which he at all times claims to have purchased does not establish a compromise, and an inference of the absence of probable cause may be drawn from the termination of the prosecution under these circumstances.¹⁰³ Especially is this true when the plaintiff never abandons his protests that the prosecution is malicious and unfounded.¹⁰⁴

Oddly enough, an early case¹⁰⁵ held that the waiver of a preliminary examination before the magistrate or grand jury conclusively established probable cause for the prosecution. The waiver, it was held, had this effect even though made to enable the plaintiff to post bond so as to avoid confinement while the preliminary hearing was held. Later cases recognized that to give the waiver a conclusive effect and at the same time give

⁹⁸ *Id.*

⁹⁹ *Moore v. First Nat'l Bank*, 140 N.C. 293, 52 S.E. 944 (1905); *Welch v. Cheek*, 125 N.C. 353, 34 S.E. 531 (1899); *Welch v. Cheek*, 115 N.C. 310, 20 S.E. 460 (1894).

¹⁰⁰ When a case is transferred to another court upon demand for a jury trial, no inference of want of probable cause is permissible since no inquiry into that issue is made incident to the transfer. *Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962).

¹⁰¹ PROSSER § 113, at 858.

¹⁰² See p. 307 *infra*.

¹⁰³ *Marcus v. Berstein, Cohen & Co.*, 117 N.C. 31, 23 S.E. 38 (1895).

¹⁰⁴ *Id.*

¹⁰⁵ *Jones v. Wilmington & W.R.R.*, 125 N.C. 227, 34 S.E. 398 (1899).

an actual finding of probable cause in the preliminary hearing only a prima facie effect was inconsistent, and the voluntary waiver of the preliminary examination is now given only a prima facie effect.¹⁰⁶

The Accused's Guilt—A Complete Defense

That the accused is in fact guilty of the charges brought against him is a complete defense to a malicious prosecution action.¹⁰⁷ The actual guilt of the accused defeats any right to recover, and proof, however conclusive, of the malicious institution of the prosecution and of the total want of probable cause for it does not entitle him to recover. The prosecution of persons guilty of criminal violations is in the public interest and the same policy which limits a malicious prosecution action to permit a good faith prosecution of the innocent when grounds exist for reasonable suspicion of guilt requires that it be restricted to exclude liability for the prosecution of the guilty. Apart from the public interest, a claim for compensation by the accused based on his prosecution for a crime he actually committed seems to be without merit.

The acquittal of the accused in the criminal prosecution does not preclude proof of his guilt in the malicious prosecution action.¹⁰⁸ The criminal standard of proof beyond a reasonable doubt does not apply, and it is sufficient to establish the accused's guilt by the preponderance of the evidence. The issue involved is the accused's guilt at the time of the malicious prosecution trial, and it may be shown by evidence discovered for the first time after the criminal prosecution was begun or after it ended.¹⁰⁹ Proof is not limited, as it is on the issue of probable cause, to facts and circumstances within the defendant's knowledge when the prosecution was begun and any evidence that tends to show guilt is admissible.¹¹⁰

Functions of Judge and Jury

Most jurisdictions hold that probable cause is a question of law to be decided by the court.¹¹¹ Factual disputes and the credibility of witnesses are decided by the jury, but once the facts are established, the determination whether the defendant had grounds for a reasonable belief in the

¹⁰⁶ *Bryant v. Murray*, 239 N.C. 18, 79 S.E.2d 243 (1953); *Jones v. Wilmington & W.R.R.*, 131 N.C. 133, 42 S.E. 559 (1902).

¹⁰⁷ Cases cited in note 60 *supra*.

¹⁰⁸ *Bell v. Percy*, 27 N.C. 83 (1844).

¹⁰⁹ *Mooney v. Mull*, 216 N.C. 410, 5 S.E.2d 122 (1939); *Thurber v. Eastern Bldg. & Loan Ass'n*, 118 N.C. 129, 24 S.E. 730 (1896).

¹¹⁰ *Id.*

¹¹¹ PROSSER § 113, at 865-66.

guilt of the accused is one of law for the judge. Under this view the facts may be established by a special verdict, or the whole case may be presented to the jury under instructions that indicate the presence or absence of probable cause in the different factual situations that the jury could find to exist from the evidence.¹¹²

Many North Carolina cases seem to follow the view outlined above. An early case which illustrates this line of decisions is *Beal v. Robeson*.¹¹³ In this case the trial court instructed that " 'should the jury conclude, in making an application of the facts proved, that the evidence before the minds of the defendants furnished them, at the time, with reasonable grounds of suspicion and for suing out the warrant, the plaintiff could not recover.' "¹¹⁴ The instruction was held erroneous:

This case brings up again the question, whether probable cause is matter of law, so as to make it the duty of the Court to direct the jury, that, if they find certain facts upon the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the Court, as a matter of law. Upon that question the opinion of the Court is in the affirmative¹¹⁵

The point is concluded in the State by repeated adjudications But, independent of authority, our reflections satisfy us, that the principle is perfectly sound. It is a question of reason, whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime¹¹⁶

Now, our enquiry is, whether, for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the Court or the jury be the more competent; and we think, very clearly, that the Court is, because it is a question of general and legal reasoning, and can best be performed by those whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts, and contradictory evidence . . . of properly separating to the comprehension of the jury, and to the satisfaction of the Judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the Court or jury, and does not at all help us in saying whether this or that point should be decided by the one or the other¹¹⁷

¹¹² *Beal v. Robeson*, 29 N.C. 280, 283 (1847).

¹¹³ 29 N.C. 280 (1847).

¹¹⁴ *Id.* at 282.

¹¹⁵ *Id.* at 282-83.

¹¹⁶ *Id.* at 283-84.

¹¹⁷ *Id.* at 285.

Parallel to this line of decisions is another in which the court leaves to the jury the determination whether under the facts defendant had reasonable grounds for belief in plaintiff's guilt. *Newton v. McGowan*,¹¹⁸ a recent case, illustrates this line of decisions. In this case the trial court, after instructing the jury that the burden of proof to show the absence of probable cause was on the plaintiff, continued:

[I]f the plaintiff has satisfied you . . . that the affidavit made by the defendant was made without a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of [the] crime of larceny . . . or such affidavit for the issuance of such warrant was made by the defendant without there existing to his knowledge such a state of facts as would lead a man of ordinary caution to believe or to entertain an honest and strong suspicion that the plaintiff was guilty of the larceny [you should find no probable cause for the prosecution.]

If, on the other hand, you find that the defendant had a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff had stolen his wood [you should find probable cause for the prosecution to exist.]¹¹⁹

The court upheld this instruction.

The fundamental conflict between these lines of decisions involves whether the judge or jury determines under the facts if grounds for reasonable belief in guilt exists. Both verbalize the rule that probable cause is a question of law for the court to decide. Similar inconsistencies exist in the decisions of many other jurisdictions holding that probable cause is a question of law.¹²⁰ Theoretically, at least, the rule has been interpreted to make the determination of the presence or absence of reasonable ground for belief in guilt a function of the court and thus to take from the jury one of the functions it normally performs in civil litigation. This theoretical interpretation of the rule has not always been honored in practical application and the result is the confusion found in the cases from North Carolina and other jurisdictions.

The probable explanation for this divergent application of the rule lies in the difficulties its strict application would create. Strict application requires a special verdict, an instruction that indicates the presence or absence of probable cause under various factual versions which the jury

¹¹⁸ 256 N.C. 421, 124 S.E.2d 142 (1962).

¹¹⁹ *Id.* at 424, 124 S.E.2d at 144.

¹²⁰ Annot., 87 A.L.R.2d 183 (1963).

may find from the evidence, or submission of the case to the jury in some other way that preserves to the court the determination of probable cause. When the factual determinations involved in the case are numerous and complicated and must be made from conflicting evidence, presentation of a case—which usually involves issues other than probable cause—in a way that permits the court to decide the question of probable cause is, to say the least, difficult. The submission of the case to the jury, except under a special verdict, is further complicated by the importance, upon the determination of probable cause, of a number of inferences and presumptions which are based upon the disposition of the original proceedings¹²¹ or a variety of other factors, such as the defendant's reliance upon the advice of an attorney in prosecuting the action.¹²²

Although any realistic appraisal of the predominance of either of these views¹²³ is difficult, a number of recent decisions¹²⁴ leave to the jury the determination whether defendant had reasonable grounds for belief in plaintiff's guilt. Further, certain principles are applicable whichever view is followed. The determination of the facts is for the jury, and the judge must instruct at least as to what in law constitutes probable cause.¹²⁵ The court cannot instruct the jury that probable cause or the want of it has been shown, since the truth of the evidence is for the jury.¹²⁶ An instruction for the jury to find probable cause, if they believe the evidence,¹²⁷ or a peremptory instruction that probable cause is lacking,¹²⁸ may be appropriate if that is the only reasonable conclusion that can be drawn from the facts. When all the facts that the evidence tends to show, if taken

¹²¹ See pp. 295-98 *supra*.

¹²² See pp. 294-95 *supra*.

¹²³ Cases which support the view that the determination whether reasonable grounds for belief in guilt exist is for the judge include: *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950); *Rawls v. Bennett*, 221 N.C. 127, 19 S.E.2d 126 (1942); *Wilkinson v. Wilkinson*, 159 N.C. 265, 74 S.E. 740 (1912); *Downing v. Stone*, 152 N.C. 525, 68 S.E. 9 (1910); *Jones v. Wilmington & W.R.R.*, 125 N.C. 227, 34 S.E. 398 (1899); *Durham v. Jones & Powell*, 119 N.C. 262, 25 S.E. 873 (1896); *Bradley v. Morris*, 44 N.C. 395 (1853). Cases which support the view that this determination is for the jury include: *Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962); *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948); *Mitchem v. National Weaving Co.*, 210 N.C. 732, 188 S.E. 329 (1936); *Stanford v. Grocery Co.*, 143 N.C. 419, 55 S.E. 815 (1906); *Thurber v. Eastern Bldg. & Loan Ass'n*, 118 N.C. 129, 24 S.E. 730 (1896).

¹²⁴ See cases cited note 123 *supra*.

¹²⁵ *Bryant v. Murray*, 239 N.C. 18, 79 S.E.2d 243 (1953); *Leggett v. Blount*, 4 N.C. 560 (1817).

¹²⁶ *Id.*

¹²⁷ *Durham v. Jones & Powell*, 119 N.C. 262, 25 S.E. 873 (1896).

¹²⁸ *Rice v. Ponder*, 29 N.C. 390 (1847).

as established, are insufficient to support the finding that the court has directed, the instruction is erroneous.¹²⁹

MALICE

Malice is an essential element of a malicious prosecution action and the plaintiff must plead and prove it if he is to recover.¹³⁰ Although in the past the supreme court has vacillated on the question of the type of malice required,¹³¹ it is now clear that express or particular malice in the sense of personal ill will, grudge, or a desire to be revenged is not necessary.¹³² General malice is sufficient and consists of a wrongful act done intentionally without just cause or excuse.¹³³ The determination whether malice exists is for the jury.¹³⁴

Malice sufficient to take the case to the jury may be implied from the want of probable cause,¹³⁵ though lack of probable cause is not sufficient to establish conclusively malice or to create a presumption that it exists. The inference is merely one of fact which the jury may or may not make. It is only evidence of malice to be considered by the jury with any other evidence that may be offered.¹³⁶ In the absence of other evidence, however, the jury may still reject the inference.¹³⁷ When the prosecution is completely groundless, the jury may infer malice almost of necessity since it cannot be accounted for in any other way.¹³⁸

A prosecution which is initiated to accomplish some collateral purpose is malicious.¹³⁹ Malice is present when a prosecution is begun to coerce the payment of a debt,¹⁴⁰ or a lunacy proceeding is instituted to harass

¹²⁹ *Johnson v. Chambers*, 32 N.C. 287 (1849); *Williams v. Woodhouse*, 14 N.C. 257 (1831).

¹³⁰ *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E.2d 751 (1960).

¹³¹ Cases which required express malice: *Savage v. Davis*, 131 N.C. 159, 42 S.E. 571 (1902); *Brooks v. Jones*, 33 N.C. 260 (1850). Cases which required general malice only: *Bell v. Percy*, 27 N.C. 83 (1844); *Johnston v. Martin*, 7 N.C. 248 (1819).

¹³² *Motsinger v. Sink*, 168 N.C. 548, 84 S.E. 847 (1915); *Downing v. Stone*, 152 N.C. 525, 68 S.E. 9 (1910).

¹³³ *Gaither v. Carpenter*, 143 N.C. 240, 55 S.E. 625 (1906); *Railroad Co. v. Hardware Co.*, 138 N.C. 175, 50 S.E. 571 (1905).

¹³⁴ *Turnage v. Austin*, 186 N.C. 266, 119 S.E. 359 (1923); *Thurber v. Eastern Bldg. & Loan Ass'n*, 116 N.C. 75, 21 S.E. 193 (1895).

¹³⁵ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966); *Brown v. Martin*, 176 N.C. 31, 96 S.E. 642 (1918).

¹³⁶ *Mitchem v. National Weaving Co.*, 210 N.C. 732, 188 S.E. 329 (1936); *Merrell v. Dudley*, 139 N.C. 57, 51 S.E. 777 (1905).

¹³⁷ *Id.*

¹³⁸ *McGowan v. McGowan*, 122 N.C. 145, 29 S.E. 97 (1898) (dictum).

¹³⁹ *Dickerson v. Atlantic Ref. Co.*, 201 N.C. 90, 159 S.E. 446 (1931).

¹⁴⁰ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966); *Smith v. Somers*, 213 N.C. 209, 195 S.E. 382 (1938).

the plaintiff, to separate his grandson from him, and to impeach the validity of his will,¹⁴¹ or an attachment is levied to gain possession of property from the plaintiff.¹⁴² The defendant's declaration that he would spend a thousand dollars in order to have his revenge¹⁴³ or his threat to ruin the plaintiff's credit by filing a bankruptcy petition¹⁴⁴ is admissible evidence of malice.

That the defendant acted upon the advice of counsel is evidence that the prosecution was begun without malice.¹⁴⁵ Advice of counsel is evidence of good faith only when obtained upon a full and fair disclosure of all the facts to the attorney from whom advice about the prosecution is sought. A failure to make such disclosure is evidence of malice since it indicates that the advice was not sought honestly but in an effort to build a case against the plaintiff.¹⁴⁶ The defendant cannot use the advice of counsel as a subterfuge to escape liability, and when he is motivated by actual malice, liability will attach even though he was advised by an attorney, after a full and fair disclosure of the facts, that the prosecution was justified.¹⁴⁷ The advice of a person who is not a lawyer is not evidence of good faith and the fact that the one who advised the defendant is a justice of the peace makes no difference.¹⁴⁸

Malice exists when the prosecution is found to be completely groundless. Thus it may be found if the defendant knew of plaintiff's innocence¹⁴⁹ or brought a second prosecution upon the same evidence on which plaintiff had already been acquitted.¹⁵⁰ Malice may be shown by any other circumstances that tend to show that defendant's prosecution was not for the purpose of enforcing the criminal law. For example, a prosecution instigated because the plaintiff had been the only witness against defendant's brother in an earlier trial would be malicious.¹⁵¹ However, the conduct of others for which the defendant is not responsible cannot be relied on to establish malice. Remarks of the defendant's attorney during the course of the prosecution, which were not authorized or participated in by the

¹⁴¹ *Davenport v. Lynch*, 51 N.C. 545 (1859).

¹⁴² *Ludwick v. Penny*, 158 N.C. 104, 73 S.E. 228 (1911).

¹⁴³ *Coble v. Huffines*, 133 N.C. 422, 45 S.E. 760 (1903).

¹⁴⁴ *Nassif v. Goodman*, 203 N.C. 451, 166 S.E. 308 (1932).

¹⁴⁵ *Bryant v. Murray*, 239 N.C. 18, 79 S.E.2d 243 (1953); *Downing v. Stone*, 152 N.C. 525, 68 S.E. 9 (1910).

¹⁴⁶ *Honeycut v. Freeman*, 35 N.C. 320 (1852).

¹⁴⁷ *Davenport v. Lynch*, 51 N.C. 545 (1859).

¹⁴⁸ *Beal v. Robeson*, 30 N.C. 276 (1848).

¹⁴⁹ *Bell v. Percy*, 27 N.C. 83, 84 (1844) (dictum).

¹⁵⁰ *Coble v. Huffines*, 132 N.C. 399, 43 S.E. 909 (1903).

¹⁵¹ *Watt v. Greenlee*, 9 N.C. 186 (1822).

defendant, are not admissible.¹⁵² Similarly, the rough manner in which a police officer arrested the plaintiff when defendant had no control over it cannot be shown.¹⁵³

INSTITUTION AND FAVORABLE TERMINATION OF PRIOR PROCEEDINGS

Institution

The plaintiff must show that the prior proceedings that form the basis of his malicious prosecution action were instituted by the defendant.¹⁵⁴ Evidence that the defendant applied for the warrant against plaintiff, caused him to be arrested and bound over, went before the grand jury as a witness against him, and made a wager that he would convict the plaintiff is sufficient to show the institution of the proceedings by him.¹⁵⁵ If the defendant procures the institution of the prosecution by another, as where he hires an attorney to investigate and the attorney swears out a warrant for plaintiff's arrest, he is liable.¹⁵⁶ On the other hand, when the solicitor institutes proceedings without the defendant's solicitation on the basis of information provided by the defendant or disclosed in the defendant's unsuccessful prosecution of the plaintiff before a magistrate, institution of the proceedings by the defendant cannot be found.¹⁵⁷

North Carolina holds that the proceedings must be upon valid process before a malicious prosecution action can be maintained. When the process is void¹⁵⁸ or fails to state a criminal offense,¹⁵⁹ the proceedings on it are a nullity. Mere irregularity in the process, however, does not make it invalid, and less precision may be required in a warrant than in a formal indictment for it to be valid.¹⁶⁰ The North Carolina view is a minority one¹⁶¹ and seems to be based on technicality rather than reason. When the other essentials for a malicious prosecution action exist, the consequences to the plaintiff of his trial for an alleged crime are not alleviated by the invalidity of the process. The harm he has suffered is the same whether the process is valid or not.

¹⁵² Taylor v. Huff, 130 N.C. 595, 41 S.E. 873 (1902).

¹⁵³ Jones v. Wilmington & W.R.R., 125 N.C. 227, 34 S.E. 398 (1899).

¹⁵⁴ Mooney v. Mull, 216 N.C. 410, 5 S.E.2d 122 (1939).

¹⁵⁵ Kline v. Shuler, 30 N.C. 484 (1848).

¹⁵⁶ Brown v. Martin, 176 N.C. 31, 96 S.E. 642 (1918).

¹⁵⁷ Cooper v. Southern Ry., 165 N.C. 578, 81 S.E. 761 (1914); Humphries v. Edwards, 164 N.C. 154, 80 S.E. 165 (1913).

¹⁵⁸ Carson v. Doggett, 231 N.C. 629, 58 S.E.2d 609 (1950).

¹⁵⁹ Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953); Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

¹⁶⁰ Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

¹⁶¹ PROSSER § 113, at 854, nn. 17 & 18.

Once valid process is issued, any proceeding on it may be sufficient to support an action for malicious prosecution. The issuance of a warrant under which the plaintiff is arrested is enough, since an interference with his person results.¹⁶² Liability may also arise from the procurement of a search warrant under which an unsuccessful search of the plaintiff's premises is made.¹⁶³ Abandonment or discontinuance of the proceedings after they are begun does not prevent liability.¹⁶⁴

At common law a malicious prosecution action could be based only upon a prior criminal prosecution. In North Carolina a similar remedy was provided for some civil suits in actions for wrongful and malicious attachment, wrongful injunctions, etc.; this has been extended to cover any civil suit in which "special damages" occur.¹⁶⁵

The supreme court has stated that the prior proceeding must be a "judicial" one, and this requirement has on occasion been raised by the defendant in an attempt to avoid liability. It was unsuccessfully asserted in relation to a statutory lunacy proceeding before the clerk of court¹⁶⁶ and an administrative proceeding before a state agency.¹⁶⁷ Both were held to be judicial proceedings upon which a malicious prosecution action could be based.

Not every proceeding before an administrative agency, however, will support an action for malicious prosecution. The court has stated that an administrative proceeding may provide a basis for recovery "under certain circumstances" when "such proceeding is adjudicatory in nature and may adversely affect a legally protected interest."¹⁶⁸ To support its holding the court adopted the following reasoning from the Court of Appeals for the District of Columbia:

Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court

¹⁶² *Miller v. Greenwood*, 218 N.C. 146, 10 S.E.2d 708 (1940).

¹⁶³ *Pressley v. Audette*, 206 N.C. 352, 173 S.E. 905 (1934).

¹⁶⁴ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966).

¹⁶⁵ See pp. 307-10 *infra*.

¹⁶⁶ *Fowle v. Fowle*, 263 N.C. 724, 140 S.E.2d 398 (1965).

¹⁶⁷ *Carver v. Lykes*, 262 N.C. 345, 137 S.E.2d 139 (1964).

¹⁶⁸ *Id.* at 352, 137 S.E.2d at 145.

or by an administrative body or official. Nor should his right to redress the injury depend upon the technical form of the proceeding by which it is inflicted. The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty.¹⁶⁹

Favorable Termination

To recover in a malicious prosecution action the plaintiff must allege and prove that the prior prosecution has terminated and that its termination was in his favor.¹⁷⁰ A counterclaim cannot be maintained to recover damages for the malicious prosecution of the action in which the counterclaim is asserted.¹⁷¹ A malicious prosecution action based upon a prosecution that is still pending on appeal is also premature.¹⁷²

Proof of neither a trial and acquittal nor a formal order or judgment is necessary to establish a termination of the prior prosecution.¹⁷³

The essential thing is that the prosecution on which the action for damages is based should have come to an end. How it came to an end is not important to the party injured, for whether it ended in a verdict in his favor, or was quashed, or a *nol. pros.* was entered, he has been disgraced, imprisoned and put to expense, and the difference in the cases is one of degree, affecting the amount of recovery.¹⁷⁴

The termination must, however, result in a discharge of the plaintiff so that new process must issue to revive the proceeding against him.¹⁷⁵

The plaintiff's acquittal after trial obviously is a termination in his favor. A *nolle prosequi* or *nolle prosequi* with leave is a sufficient termination though its purpose is to preserve the rights of the state.¹⁷⁶ A discharge upon vacation of an arrest warrant,¹⁷⁷ a release by the justice of the peace,¹⁷⁸ a dismissal of the action because of failure of the prose-

¹⁶⁹ *Id.* at 353, 137 S.E.2d at 145, quoting *Melvin v. Pence*, 130 F.2d 423, 426 (D.C. Cir. 1942).

¹⁷⁰ *Wingate v. Causey*, 196 N.C. 71, 144 S.E. 530 (1928); *Johnson v. Finch*, 93 N.C. 205 (1885).

¹⁷¹ *Manufacturers & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 19 S.E.2d 849 (1942).

¹⁷² *Howell v. Edwards*, 30 N.C. 516 (1848).

¹⁷³ *Hatch v. Cohen*, 84 N.C. 602 (1881).

¹⁷⁴ *Marcus v. Berstein, Cohen & Co.*, 117 N.C. 31, 33, 23 S.E. 38, 39 (1895).

¹⁷⁵ See *Brinkley v. Knight*, 163 N.C. 194, 79 S.E. 260 (1913).

¹⁷⁶ *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948); *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936); *Dickerson v. Atlantic Ref. Co.*, 201 N.C. 90, 159 S.E. 446 (1931).

¹⁷⁷ *Tucker v. Wilkins*, 105 N.C. 272, 11 S.E. 575 (1890) (by implication).

¹⁷⁸ *Winkler v. Lenoir & B.R. Lines*, 195 N.C. 673, 143 S.E. 213 (1928).

cutor to appear,¹⁷⁹ a release obtained through habeas corpus,¹⁸⁰ and a discharge at the end of term¹⁸¹ all constitute favorable terminations on which an action for malicious prosecution can be maintained. A voluntary withdrawal or abandonment of the prosecution by the complaining witness is also a sufficient termination.¹⁸²

A termination of the proceeding by the plaintiff's conviction on the criminal charges¹⁸³ or by his release upon failure of the trial magistrate to appear is not a favorable termination.¹⁸⁴ No favorable termination exists when it is brought about by the plaintiff's own action or results from a compromise into which he has voluntarily entered.¹⁸⁵ Under these circumstances the plaintiff has instigated or consented to a termination that leaves undetermined the issues of his guilt and of the sufficiency of defendant's evidence to establish it. Some courts hold¹⁸⁶ that a compromise conclusively establishes probable cause for the prosecution so as to defeat the malicious prosecution action. Although the practical effect of the two views of the effect of a compromise is the same, the sounder position seems to be the one that holds that the compromise prevents a finding of a termination in favor of the plaintiff.

MALICIOUS INSTITUTION OF CIVIL PROCEEDINGS

North Carolina, as do apparently a slight majority of American jurisdictions,¹⁸⁷ permits an action for malicious prosecution in relation to some civil proceedings. Although recovery in a malicious prosecution action based upon earlier civil proceedings may include elements of damages similar to those recovered in an action based upon a prior criminal prosecution, it is clear that the proof necessary for recovery in the two situations is not identical. Where the tort action grows out of earlier criminal proceedings, the plaintiff is entitled to recover at least nominal damages upon proof that the defendant initiated the proceedings maliciously and without probable cause and that the proceedings terminated in his favor.¹⁸⁸ Here recognition of the tort action safeguards the plaintiff's interest in freedom from malicious, unjustified criminal prosecution

¹⁷⁹ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966).

¹⁸⁰ *Fowle v. Fowle*, 263 N.C. 724, 140 S.E.2d 398 (1965).

¹⁸¹ *Murray v. Lackey*, 6 N.C. 368 (1818).

¹⁸² *Hadley v. Tinnin*, 170 N.C. 84, 86 S.E. 1017 (1919).

¹⁸³ *Hardin v. Borders*, 23 N.C. 143 (1840).

¹⁸⁴ *Brinkley v. Knight*, 163 N.C. 194, 79 S.E. 260 (1913).

¹⁸⁵ *Welch v. Cheek*, 125 N.C. 353, 34 S.E. 531 (1899).

¹⁸⁶ PROSSER § 113, at 858.

¹⁸⁷ PROSSER § 114, at 870.

¹⁸⁸ *Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962).

by providing a means of redress and whatever incidental deterrent effect it may have.

On the other hand, no cause of action arises from the malicious instigation of civil proceedings, standing alone, even though begun without probable cause and terminated in plaintiff's favor. Before any cause of action will exist in connection with malicious, unjustified civil proceedings, they must have resulted in special damages beyond those normally incident to a civil proceeding.¹⁸⁹ The reasons for the special damages requirement are set out by the court in *Ely v. Davis*:

The Legislature has seen fit to provide for the award of costs to the successful litigant in civil actions, by way of compensation for expenses incurred, and these costs have been held to be the only compensation allowed by law

The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have their claims determined in the Courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause, an action for malicious prosecution would lie against him, would open the flood-gate to a species of litigation hitherto unknown in North Carolina¹⁹⁰

A cause of action for malicious prosecution will not lie solely on the grounds that defendant caused service of summons on the plaintiff in a suit for recovery on a note, since no special damages would result.¹⁹¹ However, if in connection with the civil proceeding, the defendant has caused execution to be issued against the plaintiff's person¹⁹² or has caused his property to be attached¹⁹³ or taken control of by a receiver,¹⁹⁴ an action for malicious prosecution will lie. An action to set aside a deed in which *lis pendens* is filed creates a cloud upon plaintiff's title and is considered sufficient interference with plaintiff's property to bring it within the rule.¹⁹⁵ Where defendant causes a restraining order to issue prohibiting a designated use by plaintiff of his property, the interference

¹⁸⁹ *Carver v. Lykes*, 262 N.C. 345, 137 S.E.2d 139 (1964).

¹⁹⁰ 111 N.C. 24, 27, 15 S.E. 878, 878 (1892).

¹⁹¹ *Jerome v. Shaw*, 172 N.C. 862, 90 S.E. 764 (1916).

¹⁹² *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921); *Tucker v. Wilkins*, 105 N.C. 272, 11 S.E. 575 (1890).

¹⁹³ *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E.2d 645 (1954); *Tyler v. Mahoney*, 166 N.C. 509, 82 S.E. 870 (1914).

¹⁹⁴ *Nassif v. Goodman*, 203 N.C. 451, 166 S.E. 308 (1932).

¹⁹⁵ *Chatham Estates v. American Nat'l Bank*, 171 N.C. 579, 88 S.E. 783 (1916).

has also been held sufficient.¹⁹⁶ An action for malicious prosecution has also been sustained on the basis of the institution of proceedings before the clerk of court under which the plaintiff was committed to a state mental hospital.¹⁹⁷

Carver v. Lykes,¹⁹⁸ a recent case, upheld a malicious prosecution action based upon the instigation by defendant of a hearing into the conduct of a real estate broker by a state real estate licensing board with power to revoke or suspend the realtor's license. The defendant had filed a written, verified complaint with the licensing board, which, if it made out a *prima facie* case, required the board because of a statutory provision to hold the hearing. The requirement of "special damages" may be met in this case either because the hearing could result in loss or suspension of plaintiff's license or, less specifically, because of the possible adverse effect the charge of misconduct could have on plaintiff's business. The first of these grounds seems to be the one relied upon by the court. As neither loss nor suspension of plaintiff's license occurred at any time, *Carver* appears to represent a definite extension of the type of interference with the person or property recognized in previous cases as sufficient to support an action for malicious prosecution. In a sense, it may be a natural extension of an earlier decision¹⁹⁹ that the restraint on alienability of real property resulting from an action to set aside a deed in connection with which *lis pendens* was filed is sufficient. Yet, in that case both the restraint on alienability resulting from the *lis pendens* and the property to which it applied were specific; in the present case, this is true only if the potential, rather than the actual, consequences of the earlier civil proceeding are considered. If only the actual consequences to the plaintiff of the proceeding before the licensing board are taken into account, the interference amounts to nothing more than the general adverse effect upon the plaintiff's business opportunities of the charge of misconduct and the hearing on that charge.

Examination of these possibilities demonstrates why the *Carver* case appears to expand the recognition of an action for malicious prosecution based upon civil proceedings. If we consider the potential effect of a civil proceeding, every civil suit for recovery of money, if successful, will result in a lien against plaintiff's real property upon docketing of the judgment. Also, any given civil suit may affect the plaintiff's business op-

¹⁹⁶ *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920); *Martin v. Rexford*, 170 N.C. 540, 87 S.E. 352 (1915).

¹⁹⁷ *Fowle v. Fowle*, 236 N.C. 724, 140 S.E.2d 398 (1965).

¹⁹⁸ 262 N.C. 345, 137 S.E.2d 139 (1964).

¹⁹⁹ *Chatham v. American Nat'l Bank*, 171 N.C. 579, 88 S.E. 783 (1916).

portunities almost as drastically as the revocation or suspension of his license. If only the actual consequences of the civil proceeding are to be taken into account, any number of civil proceedings may have the same or a worse adverse effect upon the plaintiff's business as an unsuccessful hearing to revoke or suspend his business license. One may legitimately ask, if the effect of the *Carver* decision is to extend the protection afforded by an action for malicious prosecution, why relationships other than commercial should not be given equal protection by the law.

It should also be noted that although the "special damages" rule states a prerequisite to the existence of the cause of action, apparently it does not place any limitation upon the damages recoverable once the cause of action is proved. Thus, in the *Carver* case the court recognized that the plaintiff "may recover for any resulting loss of business, injury to reputation, mental suffering, expenses reasonably necessary to defend himself against the charge, and any other loss which proximately resulted from the defendant's wrongful action."²⁰⁰

²⁰⁰ 262 N.C. at 352-53, 137 S.E.2d at 145.